SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO.,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

DISCOVER PROPERTY & CASUALTY COMPANY, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652933/2012 **E**

Hon. Andrea Masley

INSURERS' REPLY BRIEF IN SUPPORT OF MOTION SEEKING PARTIAL REVIEW OF THE FEBRUARY 26, 2019 MEMORANDUM AND ORDER OF SPECIAL REFEREE MICHAEL DOLINGER REGARDING THE NFL PARTIES' MOTION TO COMPEL

(Reinsurance and Reserves)

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I. PRELIMINARY STATEMENT

Pursuant to CPLR § 3104(d), the Insurers[1] respectfully submit this Reply to the NFL and NFL Properties LLC's (collectively, the "NFL Parties") Memorandum of Law in Opposition to Insurers' Motion for Partial Review of Memorandum of Special Referee Michael Dolinger Regarding Motion to Compel Production of Reinsurance and Reserve Information (hereinafter, the "Opposition" or "Opp."). For the reasons set forth below and in the Insurers' Memorandum of Law Seeking Partial Review of the February 26, 2019 Memorandum and Order of Special Referee Michael Dolinger Regarding the NFL Parties' Motion to Compel (Reinsurance and Reserves) (the "Insurers Brief"), the Insurers respectfully submit that Special Referee Dolinger erred in ordering the Insurers to produce information relating to reinsurance agreements, communications with reinsurers, and reserves.

II. REINSURANCE INFORMATION

A. The NFL Parties Have Failed to Establish that CPLR 3101(f) Requires an Insurer to Produce Reinsurance Agreements in the Context of a Coverage Dispute

In their opposition, the NFL Parties utterly fail to address the Insurers' primary argument: New York law simply does not apply a *per se* rule under CPLR 3101(f) requiring insurers to produce copies of their reinsurance agreements in insurance coverage disputes. Neither have the NFL Parties cited to a single New York case standing for such a rigid interpretation of this statute.

[1] A complete list of the Insurers joining in this appeal is attached as Exhibit A to the Affirmation of Kevin J. O'Connor, Esq. in Support of Insurers' Memorandum of Law Seeking Partial Review of the February 26, 2019 Memorandum and Order of Special Referee Michael Dolinger Regarding the NFL Parties' Motion to Compel ("O'Connor Aff.").

Instead of addressing the Insurers' substantive arguments, the NFL Parties erroneously assert that: (1) "[t]he Insurers do not dispute that the plain language of CPLR 3101(f) covers reinsurance agreements;" and (2) "[t]he legislative history clearly demonstrates that ***insurance agreements*** must be disclosed under CPLR 3101(f) regardless of their relevance to the action." Opp. at 17-18 (emphasis added). The NFL Parties' arguments in this regard are without merit.

First, the Insurers have never taken the position that "the plain language of CPLR 3101(f) covers reinsurance agreements." To the contrary, the Insurers ***have*** disputed, and continue to dispute, the NFL Parties' position that reinsurance agreements fall within the scope of the plain language of this rule. CPLR 3101(f) provides, in its entirety:

> Contents of ***an insurance agreement***. A party may obtain discovery of the existence and contents of any ***insurance agreement*** under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the ***insurance agreement*** is not by reason of disclosure admissible in evidence at trial. For purpose of this subdivision, an application for ***insurance*** shall not be treated as part of an ***insurance agreement***.

(emphasis added). Noticeably absent from this language is any mention of ***reinsurance*** agreements. Thus, while CPLR 3101(f) certainly addresses ***insurance policies***, it is entirely silent with respect to the production of ***reinsurance policies***.

Similarly, the issue of whether or not "***insurance agreements*** must be disclosed under CPLR 3101(f)" is irrelevant to the issues addressed in this motion – which involves the potential production of reinsurance agreements, not insurance policies. Indeed, this distinction is critical given that New York courts routinely require the production of insurance policies under CPLR 3101(f), whereas no New York court has ever required the production of reinsurance agreements under CPLR 3101(f) in the context of a coverage dispute between a policyholder and its insurer.

Indeed, the NFL Parties conspicuously ignore this point in their Opposition and they do not even attempt to address this inherent flaw in their argument – i.e., that neither Anderson nor Clarendon involved a coverage dispute between a policyholder and an insurer. Importantly, when this issue ***was*** directly addressed in the context of a typical coverage dispute, the court expressly rejected an argument like the NFL Parties' and held that "Anderson . . . does not set forth a broad rule and is limited to the facts of the case," further noting:

> [The insured] attempts to apply an overly broad reading of Anderson - one that effectively embraces a per se rule that reinsurance agreements are relevant. That [the insured] relies on an attenuated interpretation of Anderson and fails to assert the relevance between reinsurance information and a material issue in this action belies its contention that the discovery sought is relevant.

Mt. McKinley Ins. Co. v Corning Inc., 2010 WL 6334283, at *1 (N.Y. Sup. Ct. Feb. 25, 2010). Similarly, in this case, the NFL Parties' interpretation of the Anderson and Clarendon cases would create a *per se* rule that does not exist under New York law.

B. The NFL Parties Have Failed to Establish that the Insurers' Reinsurance Communications are Discoverable under New York Law.

The NFL Parties' arguments regarding reinsurance communications are similarly without merit and, again, the NFL Parties inaccurately characterize the Insurers' positions in this case as well as the clear application of relevant precedent.

1. The NFL Parties' Claims for Bad Faith Failure to Consent

In arguing that the Insurers' communications with their reinsurers are relevant to "whether the Consent-Refusing Insurers refused to consent to the class settlement in good faith," the NFL Parties erroneously argue that certain Insurers waived this argument because they "did not dispute this point in their brief before the Special Referee." Opp. at 12-13. Again, the NFL Parties misstate the record which is clear on this point.

Contrary to the NFL Parties' "waiver" argument, the Insurers have repeatedly and consistently argued that the NFL Parties' requests for reinsurance communications are irrelevant to ***all*** of the NFL Parties' claims in this Coverage Action, including the bad faith claims asserted against certain of the Insurers. Insurers' Memorandum of Law in Opposition to the NFL Parties' Motion to Compel Disclosure ("Insurers' Opposition Brief"),[2] at 25 ("[t]he documents and information sought by the NFL Parties regarding the Insurers' reinsurance agreements and communications with reinsurers about this case are . . . ***completely irrelevant to resolution of the coverage issues***"), and 27 ("… even if reinsurance agreements and communications with reinsurers were somehow relevant to the determination of the coverage issues in this case – ***which they are not***") (emphasis added). Thus, the NFL Parties' "waiver" argument is baseless.

With respect to the actual merits of the Insurers' arguments on this topic, the NFL Parties primarily challenge the Insurers' recital of the relevant facts at issue in Imperial Trading – an unpublished decision from the Eastern District of Louisiana that was relied upon by the Special Referee in his decision – in order to distinguish Imperial Trading from the present case. In this regard, the NFL Parties erroneously argue that Imperial Trading "broadly" holds that reinsurance communications are necessarily relevant to any and all bad faith claims, regardless of the factual context. Opp. at 13. This is simply not true based on the facts of that case. In Imperial Trading, the court specifically addressed whether reinsurance communications were relevant to claims by the policyholder that the insurer "failed to participate in the adjustment process in good faith" and the court found that the insurer was only required to produce reinsurance communications that "contain information regarding plaintiffs' insurance claims and/or information regarding [the insurer's] handling of those claims." Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.,

[2] Attached as Exhibit C to the O'Connor Aff.

2009 WL 1247122, at *1, *4 (E.D. La. May 5, 2009). Thus, the holding in Imperial Trading is limited to the facts of that case – which involved claims for bad faith claims handling in denying coverage for part of the insured's claim, not bad faith failure to unconditionally consent to an unsupported settlement – and it does not stand for the broad proposition that reinsurance communications are *per se* relevant to any bad faith claims made against an insurer.[3]

Indeed, the NFL Parties further argue – demonstrating that they are fully aware of the limitations of Imperial Trading – that, in any event, "[t]he NFL parties have alleged that the Consent-Refusing Insurers *did* handle the NFL parties' claim in bad faith . . . ." Opp. at 13. This is incorrect. The NFL Parties have asserted a single counterclaim for bad faith against certain Insurers in this case, Count V of the NFL Parties' Amended Answer to Amended Complaint and Second Amended Counterclaims and Cross-Claims, Index No. 652933/2012E, NYSCEF Doc. No. 328 ("Count V").[4] Count V solely alleges "Bad Faith Refusal to Consent to the Class

[3] In support of their argument that reinsurance communications are relevant to a policyholder's claims for bad faith refusal to consent to a settlement, the NFL Parties also cite to a decision from the Northern District of Illinois – Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Cont'l Illinois Corp., 116 F.R.D. 78 (N.D. Ill. 1987) – which the NFL Parties describe as "a decision that ordered discovery of a consent-refusing insurer's communications with its reinsurers." NFL Opposition at 13-14. That decision, however, does not directly address whether reinsurance communications are relevant to an insured's claim against an insurer for bad faith failure to consent to a settlement. Id. at 82 (addressing relevance of reinsurance information to insured's counterclaims responding to insurers' claim that insured breached duty to cooperate).

[4] ¶¶ 94-100.

Settlement" and, importantly, it does not contain ***any*** allegations relating to the Insurers' "handling" of the NFL parties' claims in bad faith. Thus, the NFL Parties' position that it has alleged claims against certain Insurers for bad faith claims handling is entirely without merit.

2. The Insurers' Failure to Disclose Defense

The NFL Parties object to the Insurers' assertion that Fireman's Fund was decided on the grounds "that the alleged failure to disclose in that case 'involved an insurer's knowledge of a single dock.'" Opp. at 14. Specifically, the NFL Parties argue that the Insurers' interpretation is "artificial and strained" and that it "finds no support in the language of the decision." Id. at 15. The NFL Parties, again, do not appear to take issue with any of the substantive points raised by the Insurers and, instead, their primary objection appears to be that the Insurers believe – correctly – that the holding of a case should be based on an accurate understanding of the facts at issue therein.

Importantly, the Insurers' interpretation is neither "artificial" nor "strained" because the holding in Fireman's Fund ***was*** based on the insurer's knowledge of a single dock. Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York, 284 F.R.D. 132, 137 (S.D.N.Y. 2012) (holding reinsurance information potentially relevant on grounds that it might contain "a rating formula" relating to the "age and condition" of a specific dry dock insured under the insurance policy). Thus, Fireman's Fund – which involved a failure to disclose defense that might prevail or not based on the disclosure of a single "rating formula" – is distinguishable from the Insurers' "failure to disclose" defenses in this case, which are based on the of facts regarding what the NFL Parties knew about concussions and related neurocognitive injuries in football and whether they properly disclosed such information to their Insurers.

3. The Interpretation of Disputed Policy Language

Relying primarily on Ins. Co. of N. Am. v. UNR Indus., 1994 WL 683423 (S.D.N.Y. Dec. 6, 1994), the NFL Parties argue that, "[a]lthough the Special Referee did not reach the question, the request for these communications is also reasonably calculated to lead to relevant information regarding interpretation of disputed policy provisions, which is a third and independent ground for confirming the order." Opp. at 12.

This argument, however, was raised by the NFL Parties in their initial briefing and was properly rejected by Special Referee Dolinger. Memorandum of Law in Support of the NFL Parties' Motion to Compel Disclosure,[5] at 29 (citing UNR for proposition that "[c]ourts have ordered the disclosure of reinsurance materials in coverage litigation where, as here, there are disputes regarding the interpretation and application of insurance policy language"). Special Referee Dolinger expressly found that reinsurance communications were only "discoverable to the extent that a carrier has asserted 'failure to disclose' defenses or is targeted by bad-faith claim." See Index No. 652813/2012, Doc. No. 502, Index No. 652933/2012E, Doc. No. 510 ("Referee's Memorandum & Order"), at 76. Given that "[t]he NFL parties have chosen not to challenge those aspects of the opinion that denied the relief they sought,"[6] they have waived and failed to preserve for the Court's review their argument that reinsurance information is relevant to the interpretation of disputed policy provisions.

4. Confidentiality and Privilege Concerns

The NFL Parties erroneously claim that the confidentiality concerns addressed by the Insurers in their moving brief constitute "[r]aising a new argument in their motion for review."

[5] Attached as Exhibit B to the O'Connor Aff.

[6] NFL Opposition, at 1.

Opp. at 16. The Insurers have consistently taken the position that the production of reinsurance information raises confidentiality concerns, including with respect to the other co-defendant Insurers. Insurers' Opposition Brief, at 28 (quoting case law stating that "reinsurance materials contain confidential business information regarding the pricing and coverage of reinsurance policies, which, if revealed to competitors, ***including co-defendants herein*** could damage the insurance carriers ability to compete in the reinsurance market as well as harm present business relationships with reinsurers" and noting immediately thereafter that ***"[t]he same is true in this case***") (emphasis added).

5. Scope of the NFL Parties' Request

The NFL Parties do not dispute that Special Referee Dolinger failed to properly limit the timing and scope of the NFL Parties' Request for reinsurance information. Accordingly, even assuming *arguendo* that certain of the reinsurance information sought by the NFL Parties in this case is discoverable, the Insurers request that this Court properly limit the scope of the Requests to applicable reinsurance communications dated prior to the commencement of this Coverage Action.

III. RESERVE INFORMATION

The Insurers' petition for review of the Special Referee's discovery order as to reserve information is based upon a simple point – that all of the cases relied upon by Judge Dolinger addressed a circumstance not present in this case. Specifically, those cases allowed reserve information discovery only where the insurer refused an opportunity to settle at a specific dollar amount and, when bad faith claims ensued, the court found a comparison of the insurer's contemporaneous reserve with the settlement opportunity to be relevant. Here, because the Insurers were never presented with any such opportunity, the cases neither apply nor support

discovery of the Insurers' reserves.[7] The discovery order at issue therefore is both contrary to law and clearly erroneous, and should be reversed.

The NFL Parties' opposition does not dispute the Insurers' reading of the cases or the proposition generally that the purported relevance of the reserve information lies in the comparison of a reserve amount with the Class Action Settlement. Instead, they inaccurately claim that a meaningful comparison of the value of the Settlement with a reserve amount is possible. That contention fails to withstand scrutiny and should be rejected by the Court.

A. The Insurers' Reserves Are Not Relevant Because There Is No Settlement Amount With Which to Compare Any Such Reserves.

Recognizing that the Special Referee's discovery order on reserves is premised on the ability to compare a reserve amount with a settlement amount, the NFL Parties attempt to characterize the monetary award matrix included within the Settlement as a fixed amount with which to meaningfully compare a reserve. The NFL Parties know full well that characterization of the settlement matrix is not accurate. The matrix was (and remains) merely a method by which future claims – most of which had not yet even been asserted at the time consent was sought – would be assigned values. It assigned base values to specific claim types (ALS, Parkinson's, Alzheimer's, etc.) and applied discounts to those base values based on player/claimant characteristics (years of play, age at disease onset, etc.). What it did not do was set a class action settlement value with which to compare a reserve amount. There were far too

[7] Although the umbrella and excess insurers intend to challenge the reasonableness of the settlement, Special Referee Dolinger nevertheless ruled that these insurers were not required to produce reserve information. The Insurers understand the NFL Parties Opposition to not challenge that approach.

many unknown variables for the matrix to be converted into an overall value, including each of the following:

- The number of claims that would be made;
- The disease type of those claims;
- The players who would make the claims;
- The player-specific discounts that would be applicable; and
- When the claims would be asserted.

Each of these unknown variables are significant factors in determining the ultimate settlement amount. See In re Nat. Football League Players' Concussion Injury Litigation, 307 F.R.D. 351, 398-411 (E.D. PA April 22, 2015).

Other information necessary to make a meaningful comparison between a reserve amount and the Settlement was also unknown when the issue of consent was raised with the Insurers. For example, the Settlement makes no allocation of liability for settlement payments between the two NFL Parties. This allocation is a critically important factor to a meaningful comparison of any reserves with anticipated liability or settlement amounts, because most of the Insurers have different potential liability to each separate entity. Additionally, basic information necessary to a meaningful comparison of reserves with the Settlement, such as what share of the settlement the NFL Parties contended the reserving insurer was obligated to pay, was unknown at the time the Insurers were asked to consent.

In short, the reserve discovery sought will not permit the type of reserve-to-settlement comparison that the case law relied upon by Judge Dolinger indicated may lead to the discovery of admissible evidence. The NFL Parties' resort to the Settlement award calculation matrix does not cure this patent logical flaw in the Order. Instead of leading to relevant information, the

discovery at issue would lead only to the costly and time-consuming side litigation envisioned by the NFL Parties' opposition about how the Insurers calculated any reserves they may have established.

B. Reserve Information Post-Dating the Class Action Settlement Is Not Relevant.

Timing is an important and necessary limitation on any reserve discovery that survives this appeal. The bad faith claim alleged against certain of the Insurers is limited to the refusal to consent to the 2015 Class Action Settlement. See National Football League and NFL Properties LLC's Second Amended Counterclaims and Cross-Claims, ¶¶ 94-100, NYSCEF Doc. No. 328. Only reserves in place at that time – i.e., prior to the NFL Parties agreeing to the Settlement – could have any bearing on whether certain Insurers' refusal to consent was consistent or inconsistent with whatever state of mind might be reflected in a reserve figure. The NFL Parties' bad faith claim, asserted in 2017, makes no mention whatsoever of any claim of continuing bad faith after 2015. Given the sensitive nature of reserve information, and the strong public policy reasons that mitigate against its disclosure (See Insurer's Brief, at p. 9), any disclosure ordered should be narrowly-tailored to the timeframes relevant to the bad faith claims actually pleaded by the NFL Parties.

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